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6     **SELENA MELTON, BY AND THROUGH HER**  
7     **GUARDIAN AD LITEM, BEVERLY CANNON**  
8     **MOSIER,**

9                 Plaintiff,

10                 vs.

11     **CALIFORNIA DEPARTMENT OF**  
12     **DEVELOPMENTAL SERVICES, ET AL.,**

13                 Defendants.

14                 CASE No. 20-cv-06613-YGR

15                 **ORDER GRANTING IN PART AND DENYING**  
16                 **IN PART MOTIONS TO DISMISS AND**  
17                 **DENYING MOTION FOR SANCTIONS**

18                 Re: Dkt. Nos. 52, 53, 54, 64

19                 Plaintiff Selena Melton, by and through her guardian ad litem Beverly Cannon Mosier,  
20                 brings this action against defendants California Department of Developmental Services (“DDS”),  
21                 Regional Center of the East Bay, Inc. (“RCEB”), and Arleen’s Residential Care, Inc. (“Arleen’s”),  
22                 alleging violations of federal and state laws prohibiting disability discrimination. Defendants have  
23                 separately moved to dismiss the First Amended Complaint (“FAC”) for lack of subject matter  
24                 jurisdiction and/or failure to state a claim. (Dkt. Nos. 52, 53, 54.) In addition, RCEB moves to  
25                 sanction plaintiff’s counsel for pressing frivolous arguments about exhaustion. (Dkt. No. 64.)  
26                 Having carefully reviewed the amended pleadings and the parties’ briefing on the motions, the  
27                 Court **GRANTS IN PART AND DENIES IN PART** the motions to dismiss and **DENIES** the motion for  
28                 sanctions.

29                 **I. BACKGROUND**

30                 The FAC alleges as follows:

31                 Plaintiff Selena Melton is 52 years old, was born deaf, and became blind later in life.  
32                 (FAC ¶¶ 1, 5.) She uses Tactile American Sign Language (“ASL”) to communicate, which  
33                 involves using one’s hands to feel the ASL hand gestures of the signer. (*Id.* ¶¶ 1, 9, 10.) Plaintiff  
34                 also has been diagnosed with a mild intellectual disability, mild cerebral palsy, epilepsy, and

1 anxiety. (*Id.* ¶¶ 1, 5.) As a result of her developmental disabilities, plaintiff has been receiving  
2 services administered by state agency DDS pursuant to the California Developmental Disabilities  
3 Services Lanterman Act (“Lanterman Act”), California Welfare & Institutions Code (W.I.C.),  
4 Section 5400, *et seq.* (*Id.* ¶ 6.) The Legislature determined that “[s]ervices and supports should be  
5 available to enable persons with developmental disabilities to approximate the pattern of everyday  
6 living available to people without disabilities of the same age.” (*Id.* ¶ 12 (quoting W.I.C. § 4501).)

7 Under this comprehensive statutory scheme, DDS contracts with nonprofit corporations to  
8 establish and operate a statewide network of regional centers. W.I.C. § 4620. Regional centers,  
9 like RCEB, are responsible for determining eligibility, assessing needs, and coordinating the  
10 delivery of services for developmentally disabled persons, referenced in the statute as  
11 “consumers.” *Id.* If a regional center determines that an individual has a developmental disability  
12 and is eligible for services, a planning team, comprised of the individual with the disability, the  
13 parents or guardian, one or more regional center representatives, and any other person or entity  
14 invited to participate, draws up an individual program plan (“IPP”). *Id.* § 4512(j). The goals  
15 developed through the IPP process should maximize opportunities for the individual to be part of  
16 community life, enjoy increased control over his or her life, acquire positive roles in community  
17 life, and develop the skills to accomplish these objectives. *Id.* 4646.5(2); *see also id.* § 4646.  
18 Regional centers contract with local service providers, referenced in the statute as “vendors,” for  
19 the direct delivery of services. *Id.* § 4648.

20 Plaintiff has been an RCEB client “for close to fifty years” and, since 1994, has lived in a  
21 state-licensed group home owned and operated by Arleen’s. (FAC ¶¶ 19, 22.) RCEB contracted  
22 with Arleen’s to provide housing accommodations and social services for plaintiff. (*Id.* ¶ 25.)  
23 Before plaintiff moved to Arleen’s, the administrator at her previous home recommended to  
24 plaintiff’s RCEB caseworker that she be placed in a home where staff could communicate with her  
25 in ASL. (*Id.* ¶ 26.) Since then, “over the past several decades,” plaintiff “requested many times”  
26 for some “means to communicate equally and effectively with the staff” at Arleen’s. (*Id.* ¶¶ 26–  
27 28.) “These requests were made directly to the staff at Arlene’s (sic) and to her RCEB caseworker  
28 and are documented in her records.” (*Id.* ¶ 28.)

1       On April 18, 2018, plaintiff, her counsel, her RCEB caseworker and Arleen’s staff  
2 “unanimous[ly]” decided that she needed a person present in the group home who could  
3 communicate in Tactile ASL. (*Id.* ¶ 55.) Her IPP was “updated” to reflect this “agreement.” (*Id.*)  
4 In a May 2018 follow-up letter, plaintiff’s RCEB caseworker acknowledged that it was  
5 “imperative” to “help foster communication in American Sign Language (ASL) . . . so that Selena  
6 can communicate with the staff and individuals with whom she resides. Currently the staff at  
7 Arleen’s Residential Care Home do not use ASL so we agreed to find a vendor to provide needed  
8 communication support in Selena’s home.” (*Id.* ¶ 56.)

9       On June 12, 2018, Disability Rights California (“DRC”), then representing plaintiff and  
10 other deaf and deaf-blind regional center consumers, sent a letter to the directors of RCEB and  
11 DDS about “the widespread problem with regional centers failing to accommodate deaf  
12 consumers.” (*Id.* ¶ 67; *see also id.* ¶¶ 68–69.) The letter also addressed plaintiff’s circumstances,  
13 describing that RCEB approved her accommodations for a signing staff member in her home and  
14 updated her IPP to reflect that agreement but had done nothing further. (*Id.* ¶ 70.) The letter  
15 closed by requesting that “RCEB honor the decision of the IPP team . . . without further delay.”  
16 (*Id.* ¶ 71.) On July 13, 2018, attorneys for DRC and the director of RCEB as well as its Director  
17 of Consumer Services met to discuss plaintiff’s IPP and “RCEB’s refusal to comply with its  
18 terms.” (*Id.* ¶ 72.) According to plaintiff, there was “no clear resolution as to when [she] would  
19 be provided the effective communication RCEB had agreed to.” (*Id.*)

20       From September to December 2018, plaintiff was provided with an ASL-fluent aide for the  
21 afternoons and evenings. (*Id.* ¶ 47.) Prior to this time, plaintiff was “assigned a one-to-one aide  
22 who spends significant time with her to reduce the self-harm. However, that aide [was] never able  
23 to communicate in ASL.” (*Id.*) Arleen’s ultimately terminated the ASL-fluent aide for failure to  
24 complete mandatory staff training after it refused the aide’s request for his own interpreter for the  
25 training. (*Id.* ¶ 49.) Other than this brief assignment, RCEB and Arleen’s have not hired a staff  
26 member or behavioral consultant who could communicate in ASL. (*Id.* ¶¶ 32, 37.) “Despite the  
27 clear language of Ms. Melton’s IPP requiring RCEB and Arleen’s to provide effective  
28 communication in her home by hiring a person who can communicate in Tactile ASL, they still

1 have not done so.” (*Id.* ¶ 57.)

2 The FAC further alleges that despite its responsibility for overseeing the conduct of  
3 regional centers and ensuring that they operate in compliance with federal and state law, DDS has  
4 been aware of systemic inaccessibility for years but has taken no action. (*Id.* ¶¶ 13, 59–63, 67–  
5 75.) For example, on November 6, 2017, DDS hosted a public meeting in Oakland, California, on  
6 disparities in services for non-primary English speakers at RCEB and other regional centers in  
7 California. (*Id.* ¶ 59.) During this meeting, individuals and advocates spoke about the disparities  
8 in services for people who are deaf as compared to those provided to hearing consumers. (*Id.*)

9 Then, as discussed above, on June 12, 2018, Disability Rights California sent DDS and  
10 RCEB the letter raising the same issue. (*Id.* ¶¶ 67–71.) This letter was followed by a meeting on  
11 July 24, 2018, between attorneys from DRC and three high level administrators at DDS, including  
12 John Doyle and Brian Winfield, both Chief Deputy Directors and Hiren Paten, Chief Counsel. (*Id.*  
13 ¶ 73.) On September 4, 2018, DRC sent a letter memorializing its understanding of the July 24th  
14 meeting with DDS. The letter stated, “You agreed to release a program advisory about the  
15 affirmative obligations of regional centers to meet the communication needs of Deaf consumers in  
16 their living situations, day programs, and work programs.” (*Id.* ¶ 74.) However, as of the date of  
17 the FAC, DDS has not done so. “Nor has it taken action to intervene with RCEB on behalf of Ms.  
18 Melton to ensure she has effective communication in her DDS-funded regional center services.”  
19 (*Id.* ¶ 75.)<sup>1</sup>

20 On November 29, 2018, DDS held a focus group for “Regional Center consumers who are  
21 Deaf or Hard of Hearing, their families, and the community” to “receive your feedback on [ ]  
22 barriers and challenges to accessing services.” (*Id.* ¶ 61.) “A number of deaf support agencies  
23 and vendors who serve deaf consumers attended the focus group to testify about the pervasive

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25           <sup>1</sup> The Legislature intended that DDS “ensure that the regional centers operate in  
26 compliance with federal and state law and regulation” and empowered it to “take all necessary  
27 actions to support regional centers to successful achieve compliance with this section . . . .”  
28 W.I.C. § 4434(a), (b). For example, “DDS may be required to provide services or supports  
directly where there are identified gaps in the system of services or where there are identified  
consumers for whom no provider is available to provide the necessary services.” (FAC ¶ 14  
(citing W.I.C. § 4648(g))).

1 issue of deaf consumers not receiving adequate access to services from regional centers  
2 throughout the State.” (*Id.* ¶ 62.) Plaintiff “testified during this meeting about her experience  
3 living a home with no access to effective communication. She testified that she feels very lonely  
4 and that no one in her home understands her needs.” (*Id.* ¶ 63.)

5 After the Court dismissed the original complaint upon defendants’ motions to dismiss  
6 (Dkt. No. 47), plaintiff filed the FAC (Dkt. No. 48), seeking injunctive relief and damages  
7 pursuant to the following causes of action, namely violation of (1) Title II of the American  
8 Disabilities Act (“ADA”) against DDS; (2) Title III of the ADA against RCEB and Arleen’s; (3)  
9 Section 504 of the Rehabilitation Act against DDS and RCEB; (4) the Fair Housing Act against  
10 Arleen’s; (5) California Government Code Section 11135 against RCEB; (6) the Unruh Civil  
11 Rights Act against RCEB and Arleen’s; (7) the California Disabled Persons Act (“CDPA”) against  
12 RCEB and Arleen’s; and (8) the Elder Abuse and Dependent Adult Civil Protection Act against  
13 Arleen’s; and additionally, (9) negligence against RCEB and Arleen’s. The FAC alleges that  
14 plaintiff substantially complied with the Lanterman Act’s complaint process, outlined below, by  
15 writing to and meeting with RCEB and DDS about her unfulfilled IPP as well as system-wide  
16 inaccessibility, and therefore exhausted her applicable administrative remedies prior to seeking  
17 judicial relief. (*Id.* ¶¶ 64–76.)

## 18 II. LEGAL FRAMEWORK

### 19 A. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1)

20 “Federal courts are courts of limited jurisdiction . . . [and] it is to be presumed that a cause  
21 lies outside this limited jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,  
22 377 (1994). Under Federal Rule of Civil Procedure 12(b)(1), a defendant may challenge the  
23 plaintiff’s jurisdictional allegations in one of two ways. A “facial” attack accepts the truth of the  
24 plaintiff’s allegations but asserts that they “are insufficient on their face to invoke federal  
25 jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The district  
26 court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6), namely by  
27 determining whether the allegations are sufficient to invoke the court’s jurisdiction while  
28 accepting the plaintiff’s allegations as true and drawing all reasonable inferences in the plaintiff’s

1 favor. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013).

2 A “factual” attack, by contrast, contests the truth of the plaintiff’s factual allegations,  
3 usually by introducing evidence outside the pleadings. *Safe Air for Everyone*, 373 F.3d at 1039.  
4 “When the defendant raises a factual attack, the plaintiff must support her jurisdictional allegations  
5 with ‘competent proof’ . . . under the same evidentiary standard that governs in the summary  
6 judgment context.” *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014) (citations omitted).  
7 “The plaintiff bears the burden of proving by a preponderance of the evidence that each of the  
8 requirements for subject-matter jurisdiction has been met.” *Id.* (citation omitted). “[I]f the  
9 existence of jurisdiction turns on disputed factual issues, the district court may resolve those  
10 factual disputes itself.” *Id.* (citations omitted).

#### 11           **B. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)**

12           Under Federal Rule of Civil Procedure 12(b)(6), an action may be dismissed for “failure to  
13 state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal is appropriate  
14 where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable  
15 legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). The  
16 complaint must allege “more than labels and conclusions, and a formulaic recitation of the  
17 elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
18 When considering a motion to dismiss, a court must accept all material allegations in the  
19 complaint as true and construe them in the light most favorable to plaintiff. *NL Indus., Inc. v.*  
20 *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

#### 21           **C. ADMINISTRATIVE REMEDIES UNDER THE LANTERMAN ACT**

22           Chapter 7 of the Lanterman Act, titled “Appeal Procedure,” provides that “all issues  
23 concerning the rights of persons with developmental disabilities to receive services under this  
24 division, shall be decided under this chapter[.]” W.I.C. § 4706(a). As a general matter, “[e]very  
25 service agency shall, as a condition of continued receipt of state funds, have an agency fair hearing  
26 procedure for resolving conflicts between the service agency and recipients of, or applicants for,  
27 service.” *Id.* § 4705(a). “Services” is defined as “the type and amount of services and service  
28 components set forth in the recipient’s individual program plan pursuant to Section 4646.” *Id.* §

1 4703.7.

2 Article 3 of this chapter describes the fair hearing procedure. In particular, “[a]ny  
3 applicant for or recipient of services, or authorized representative of the applicant or recipient  
4 dissatisfied with any decision or action of the service agency which he or she believes to be illegal,  
5 discriminatory, or not in the recipient’s or applicant’s best interests, shall, upon filing a request  
6 within 30 days after notification of the decision or action complained of, be afforded an  
7 opportunity for a fair hearing.” *Id.* § 4710.5(a). Section 4712.5 provides that each party remains  
8 bound by the final administrative decision and either party may appeal the decision “to a court of  
9 competent jurisdiction.” *Id.* § 4712.5.

10 The Lanterman Act’s “fair hearing procedures are a claimant’s exclusive remedy for issues  
11 relating to the provision of services, which must first be exhausted before seeking judicial relief in  
12 the superior court.” *Harbor Reg’l Ctr. v. Office of Admin. Hearings*, 210 Cal. App. 4th 293, 312  
13 (2012) (internal citations and quotations omitted). “The administrative fair hearing procedures  
14 should be used to resolve any challenge [the plaintiff or their representative] has to the facility the  
15 regional center ultimately may select for [the plaintiff] and the services to be provided at that  
16 facility. The trial court should not resolve any such challenges in the first instance[.]” *Michelle K.*  
17 *v. Superior Court*, 221 Cal. App. 4th 409, 444 (2013). “It is well settled that if an administrative  
18 remedy is provided by statute, relief must be sought from the administrative body and such  
19 remedy must be exhausted before judicial review of the administrative action is available. . . .  
20 Accordingly, the exhaustion of an administrative remedy has been held jurisdictional in  
21 California.” *Conservatorship of Whitley*, 155 Cal. App. 4th 1447, 1463–64 (2007); *Sierra Club v.*  
22 *San Joaquin Local Agency Formation Com.*, 21 Cal. 4th 489, 510 (1999) (“The general exhaustion  
23 rule remains valid: Administrative agencies must be given the opportunity to reach a reasoned and  
24 final conclusion on each and every issue upon which they have jurisdiction to act before those  
25 issues are raised in a judicial forum.”).

26 In contrast to Article 3’s fair hearing procedure, Article 5 provides for a different dispute  
27 resolution process, namely, by complaint. “Each consumer or any representative acting on behalf  
28 of any consumer or consumers, who believes that any rights to which a consumer is entitled has

1 been abused, punitively withheld, or improperly or unreasonably denied by a regional center,  
2 developmental center, or service provider, may pursue a complaint as provided in this action.”  
3 W.I.C. § 4731(a). However, the complaint process “shall not be used to resolve disputes  
4 concerning the nature, scope, or amount of services and supports that should be included in an  
5 individual program plan, for which there is an appeal procedure established in this division . . .”  
6 *Id.* § 4731(e).

### 7 III. ANALYSIS

8 In renewing their motions to dismiss, defendants submit that dismissal is warranted on  
9 three grounds: (A) plaintiff failed to exhaust her administrative remedies; (B) the claims are time-  
10 barred; and (C) the FAC fails to state a claim for relief. To navigate the parties’ arguments, the  
11 Court construes the FAC as primarily pursuing two distinct theories: (1) a failure by RCEB and  
12 Arleen’s to provide a particular requested accommodation; and (2) a failure by DDS and RCEB to  
13 implement policies ensuring equal access to programs and services. *Compare*. FAC §§ 26–57  
14 (alleging that Arleen’s and RCEB refuse to accommodate her deaf-blind disability), *with id.* § 58  
15 (alleging that DDS and RCEB lacks policies reflecting their obligations to provide effective  
16 communication). The former focuses on plaintiff’s individualized request for a staff member at  
17 Arleen’s who can communicate in Tactile ASL, while the latter focuses on the organizations’  
18 policies or practices to improve systemic accessibility. With this distinction in mind, the Court  
19 turns to each asserted ground for dismissal.

#### 20 A. 12(B)(1) CHALLENGE BASED ON NON-EXHAUSTION

21 All defendants move to dismiss this action for lack of subject matter jurisdiction, arguing  
22 that plaintiff failed to properly exhaust her administrative remedies under the Lanterman Act.  
23 Specifically, defendants submit that plaintiff is required to utilize the fair hearing procedure before  
24 filing the instant action. The Court agrees in part.

25 The Lanterman Act explicitly states that “there is an appeal procedure established” “to  
26 resolve disputes concerning the nature, scope, or amount of services and supports that should be  
27 included in an individual program plan.” W.I.C. § 4731(e). The FAC alleges that defendants  
28 failed to procure the Tactile ASL interpreter as set forth in her IPP. (FAC ¶ 57 (“Despite the clear

1 language of Ms. Melton's IPP requiring RCEB and Arleen's to provide effective communication  
2 in her home by hiring a person who can communicate in Tactile ASL, they still have not done  
3 it.".) The failure to initiate a service included in plaintiff's IPP falls squarely within the purview  
4 of the fair hearing procedure.<sup>2</sup> Therefore, the fair hearing procedure applies to plaintiff's claims to  
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6 <sup>2</sup> Plaintiff's arguments to the contrary do not persuade. First, plaintiff argues that the fair  
7 hearing procedure governs disputes about "services and supports that should be included in an  
8 individual program plan," whereas the complaint process governs disputes about services already  
9 included in an IPP. (Opp. to RCEB Mtn. at 8.) However, plaintiff's citation to Section 4731  
10 offers no support for the distinction that she draws. Indeed, Section 4703.7 specifically defines  
11 services for purposes of the appeal procedure chapter as "the type and amount of services and  
service components *set forth in the recipient's individual program plan* pursuant to Section 4646."  
W.I.C. § 4703.7 (emphasis supplied). Because the statute's fair hearing provisions do not  
distinguish between services included in an IPP and services requested for inclusion, this  
argument fails.

12 Second, plaintiff relies on information posted on DDS's website explaining the difference  
13 between the two procedures. A webpage titled "Consumer Rights, Appeals & Complaints" lists  
frequently answer questions, including:

14                   **HOW IS [THE CONSUMER COMPLAINT PROCESS] DIFFERENT FROM  
15 FAIR HEARING?**

16                   The Fair Hearing Process is the procedure to use if you disagree with the nature,  
17 scope, or amount of services you receive, or are requesting the regional center to  
18 provide. This includes whether you are eligible for regional center services. Under  
this process, you are appealing a decision of the regional center about the services  
you are requesting or receiving.

19                   The Consumer Complaint Process is the procedure to use if you believe that the  
20 regional center, developmental center, or a provider, has violated or improperly  
21 withheld a right to which you are entitled under the law. Under this process, you  
22 are asking that the regional center, developmental center, or provider, change its  
procedures for dealing with you and others in the future.

23 (Plaintiff's Request for Judicial Notice, Dkt. No. 56, Ex. A.) Although defendants do not dispute  
24 the accuracy of this information, the Court reached its decision without need to resort to the DDS  
25 webpage and therefore declines to grant the request for judicial notice. In any event, plaintiff  
26 argues that defendants' failure to provide her with the agreed-upon Tactile ASL interpreter  
27 constitutes a deprivation of her civil rights, *i.e.*, "right[s] to which [she is] entitled under the law,"  
and therefore claims arising therefrom are to be pursued under the complaint process, not the fair  
hearing process. However, plaintiff's specific entitlement to a Tactile ASL interpreter springs  
from her right to receive services under the Lanterman Act, not from any civil rights statutes.  
Therefore, this argument also fails.

the extent that they are based on the failure to deliver services pursuant to her IPP (theory one).

The same cannot be said about the claims predicated on the failure to enact antidiscrimination policies (theory two). These claims implicate decisions impacting all Lanterman Act consumers with hearing impairments, not just plaintiff, and therefore do not qualify as a conflict between the service agency and the service recipient **about an agency action specific to her.** See W.I.C. § 4705(a). (“Every service agency shall . . . have an agency fair hearing procedure for resolving conflicts between the service agency and recipients of, or applicants for, service.”); *see also Michelle K.*, 221 Cal. App. 4th at 442 (2013) (“The Lanterman Act’s administrative fair hearing procedures allow a developmentally disabled person to challenge any *specific decision* a regional center or developmental center makes to reduce, terminate, change, or deny *that person services.*”) (emphasis supplied). The fair hearing procedure is not equipped to adjudicate system-wide claims. See W.I.C. §§ 4710–4713 (describing extensive rules for appealing discrete agency actions denying, reducing, terminating, or changing services).

Nor does the broader aspect of her claims strictly involve “the rights of persons with developmental disabilities to receive services” but rather the right of equal access to such services. *See id.* § 4502(a) (“Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California. An otherwise qualified person by reason of having a developmental disability shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity that receives public funds.”). As such, the statute’s complaint process applies to her claims of systemic inaccessibility. *See id.* § 4731(a) (“Each consumer or any representative acting on behalf of any consumer or consumers, who believes that any rights to which a consumer is entitled has been abused,

Third, plaintiff contends that applying state administrative exhaustion requirements to her federal civil rights claims violates the Supremacy Clause. However, regardless of the label used in the FAC, and as stated in the foregoing paragraph, those claims alleging a failure to provide services pursuant to the IPP implicate her right to services under the Lanterman Act, not her federal civil rights, and therefore are not properly characterized as federal civil rights claims. Accordingly, this argument lacks merit.

1 punitively withheld, or improperly or unreasonably denied by a regional center, developmental  
 2 center, or service provider, may pursue a complaint as provided in this section.”).<sup>3</sup>

3       The question then is whether plaintiff properly exhausted this administrative remedy. The  
 4 Court finds that, under the substantial compliance doctrine, she has. “Substantial compliance with  
 5 a statute ‘will suffice if the purpose of the statute is satisfied but substantial compliance means  
 6 *actual* compliance in respect to statutory purpose. The doctrine of substantial compliance excuses  
 7 technical imperfections *only after the statutory objective has been achieved.*’” *Goehring v.*  
 8 *Chapman University*, 121 Cal. App. 4th 353, 384 (2004) (quoting *Smith v. Board of Supervisors*,  
 9 216 Cal. App. 3d 862, 874–75 (1989)) (emphasis in original).

10      The Lanterman Act provides that “[i]nitial referral of any complaint taken pursuant to this  
 11 section shall be to the director of the regional center from which the consumer receives case  
 12 management services.” *Id.* § 4731(b). The director of the regional center then investigates the  
 13 complaint and responds with a written proposed resolution. *Id.* If the consumer is not satisfied  
 14 with the proposed resolution, the complaint must then be referred to the director of the department,  
 15 who then issues a written administrative decision. *Id.* § 4731(c).

16      Here, the FAC alleges that on June 12, 2018, Disability Rights California, plaintiff’s  
 17 representative at the time, sent a letter to both the directors of RCEB and DDS about “the  
 18 widespread problem with regional centers failing to accommodate deaf consumers”:

19      68. The letter stated, “Our [deaf] clients are excluded from participation in day-to-  
 20 day activities available to other consumers in residential programs funded by  
 21 regional centers. As compared to other hearing residents, these consumers are  
 22 denied the benefit of the social, emotional, and rehabilitative services offered in  
 23 these residential settings. Because these Deaf consumers cannot express their  
 24 most basic physical needs, they are denied access to services and supports of their  
 25 choice, which are available to hearing residents. This amounts to discrimination  
 26 in the administration of regional center-funded services, in violation of the ADA,

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27      <sup>3</sup> Although the fair hearing provisions refer to a consumer’s “dissatisf[action] with any  
 28 decision or action of the service agency which he or she believes to be . . . discriminatory,” W.I.C.  
 § 4710.5(a), the individualized grievances asserted here are fundamentally concerned with the  
 services selected for plaintiff. Conversely, the allegations of discrimination are asserted on a  
 system-wide basis and therefore are not subject to the fair hearing process. Accordingly, the Court  
 need not decide whether Section 4710.5(a) violates the Supremacy Clause as suggested by  
 plaintiff in her briefing.

Section 504 and California law.”

69. The letter stated further, “[N]either DDS nor RCEB have written policies to address the need for accommodations for Deaf consumers who use ASL and ensure that they have access to effective communication across all life domains. Such policies should address, for example, the procedures to obtain funding for accommodations, such as signing staff during evenings and weekends at facilities that do not have signing staff otherwise available.”

FAC ¶ 67–69.

The FAC also alleges that neither the meeting on July 13, 2018 with RCEB’s directors nor the meeting on July 24, 2018 with DDS’s administrators and chief counsel resolved the grievances set out in plaintiff’s letter. *Id.* ¶¶ 72–76. In particular, DRC memorialized its understanding of the July 24 meeting with DDS with a follow-up letter stating: “You agreed to release a program advisory about the affirmative obligations of regional centers to meet the communication needs of Deaf consumers in their living situations, day programs, and work programs.” *Id.* ¶ 74. However, no such advisory has been released to date. *Id.* ¶ 75.

Defendants are correct that because plaintiff did not identify a proposed resolution by RCEB and/or an administrative decision by DDS, plaintiff did not strictly comply with the Section 4731 complaint process. *See* W.I.C. § 4731(b)–(c).<sup>4</sup> However, nothing in the record suggests the Legislature intended strict compliance with a process designed for a consumer who believes her rights are being “abused, punitively withheld, or improperly or unreasonably denied.” *See* W.I.C. § 4731(a). Indeed, based on the provision’s use of permissive language the Court finds that the purpose of the complaint process is to allow the responsible entity an opportunity to redress the alleged rights violation by giving notice thereof. *See id.* (consumer alleging rights violation “may

<sup>4</sup> Defendants also fault plaintiff for failing to comply with 17 C.C.R. Section 50540, which requires complaints to be initially referred “to the clients’ rights advocate responsible for the facility in which such person is a resident or of which such person is a client.” 17 C.C.R. § 50540(b). Plaintiff argues that this regulation, which is titled “Complaint Procedure,” describes “a completely separate [complaint] process.” (Opp. to Arleen’s Mtn. at 8.) Although the Court notes that the regulation slightly varies from Section 4731 in terms of the complaint procedure, the Court assumes without deciding that the regulation applies. Even so, for the reasons that follow, the Court finds that only substantial compliance with the complaint process is required and therefore the failure to submit a complaint to the clients’ rights advocate is not fatal to plaintiff’s systemic inaccessibility claims.

1 pursue a complaint as provided in this section”); *cf. id.* § 4706(a) (service-related disputes “shall  
 2 be decided” under fair hearing procedure). *See, e.g., J.H. McKnight Ranch, Inc. v. Franchise Tax  
 3 Bd.*, 110 Cal. App. 4th 978, 986 (2003) (“The purposes of these statutory [exhaustion]  
 4 requirements is to ensure that the Board receives sufficient notice of the claim and its basis. The  
 5 Board then has an opportunity to correct any mistakes, thereby conserving judicial resources.’ . . .  
 6 We see no basis for construing the statutes setting out the administrative exhaustion requirement  
 7 so as to ignore actual notice the Board may have had from sources other than the four corners of  
 8 the initial claim.”) (quoting *Preston v. State Bd. of Equalization*, 25 Cal.4th 197, 205–06 (2001)).<sup>5</sup>

9       Also unlike the fair hearing procedure, Section 4731 is silent as to both the binding effect  
 10 of the outcome of the complaint process as well as the right to appeal the outcome to a court.  
 11 *Compare id.* § 4731 with *id.* § 4712.5(b) (“[E]ach party shall be bound [by the final administrative  
 12 decision following the fair hearing], and [] either party may appeal the decision to a court of  
 13 competent jurisdiction within 90 days of the receiving notice of the final decision.”). This  
 14 comparative silence supports the alternative conclusion that only substantial compliance with the  
 15 complaint process is required for exhaustion purposes. *See Brown v. Kelly Broadcasting Co.*, 48  
 16 Cal.3d 711, 725 (1989) (“It is a well recognized principle of statutory construction that when the  
 17 Legislature has carefully employed a term in one place and has excluded it in another, it should  
 18 not be implied where excluded.”).

19       Here, the FAC alleges that plaintiff’s representative met with both RCEB and DDS  
 20 following the letter addressing systemic inaccessibility and that DDS agreed to a potential solution  
 21 of the issue. These allegations demonstrate that defendants were not only aware of the complaint  
 22 but presumably investigated its merits, thereby fulfilling the objective of the statute’s complaint  
 23 mechanism, namely, to permit an opportunity to cease unlawful activity. Under such  
 24 circumstances and unlike the fair hearing procedure, no purpose would be served by requiring  
 25 plaintiff to strictly comply with Section 4731 based on the formalistic ground that no written  
 26

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27       <sup>5</sup> The Court has found no case addressing the Lanterman Act’s complaint process, much  
 28 less one addressing compliance required therewith.

1 proposed resolution by RCEB or written administrative decision by DDS was obtained.  
2 Accordingly, the Court concludes that the letter of plaintiff's representative substantially complies  
3 with the Lanterman Act's complaint process.<sup>6</sup>

4 In sum, plaintiff's claims of systemic inaccessibility are not subject to the mandatory  
5 fearing hearing process. Such claims are encompassed by the first cause of action for a violation  
6 of Title II of ADA against DDS; the second cause of action for violation of Title III of the ADA  
7 against RCEB and Arleen's; the third cause of action for violation of Section 504 of the  
8 Rehabilitation Act against DDS and RCEB; the fifth cause of action for violation of California  
9 Government Code Section 11135 against RCEB; the sixth cause of action for violation of the  
10 Unruh Civil Rights Act against RCEB and Arleen's; and the seventh cause of action for violation  
11 of the CDPA against RCEB and Arleen's. These claims are, however, subject to the complaint  
12 process in order to give defendants an opportunity to correct their alleged policymaking failures.  
13 Because the Court finds that plaintiff substantially complied the complaint process, the remedy  
14 has been exhausted and therefore jurisdiction over these claims is proper.<sup>7</sup>

15 The remaining causes of action, namely, the fourth cause of action for violation of the Fair  
16 Housing Act against Arleen's, the eighth cause of action for violation of the Elder Abuse and  
17 Dependent Adult Civil Protection Act against Arleen's, and the ninth cause of action for  
18 negligence against RCEB and Arleen's, do not allege system-wide discrimination. Instead, these  
19 causes of action raise discrete unlawful acts. To the extent that these (or any other) causes of  
20 action are based on services requested or included in plaintiff's IPP, they are subject to the  
21 mandatory fair hearing process. Because plaintiff did not exhaust this administrative remedy, the

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22  
23       <sup>6</sup> To the extent defendants fault plaintiff for not attaching the written complaint to the FAC  
24 despite alleging the contents of the letter addressing the alleged rights violations, such an  
25 argument is not well taken. Indeed, the statute does not state what form such a complaint must  
26 take or what information must be included in such a complaint. Therefore, the alleged letter itself  
27 does not violate any statutory requirement as to the form of a Section 4731 complaint.

28       <sup>7</sup> Accordingly, RCEB's motion to sanction plaintiff's counsel for pressing arguments  
about exhaustion under Section 4731's complaint process, which the Court accepted in part, is  
hereby **DENIED**.

1 Court lacks jurisdiction over these IPP-based claims. To the extent that these causes of action are  
2 not based on IPP-related services, the FAC fails to allege that these issues were raised in the  
3 DRC's complaint letter. Either way, the fourth, eighth, and ninth cause of action are **DISMISSED**  
4 **WITH PREJUDICE.**

5 Accordingly, the motions to dismiss for lack of subject matter jurisdiction is **GRANTED IN**  
6 **PART AND DENIED IN PART.** The Court now considers the 12(b)(6) challenges in connection with  
7 the first, second, third, fifth, sixth, and seventh causes of action insofar as they asserted against  
8 DDS and RCEB. Because Arleen's only challenged the FAC on the ground that plaintiff failed to  
9 exhaust the fair hearing procedure, the second, sixth, and seventh causes of action survive as to it.

10 **B. 12(B)(6) CHALLENGE BASED ON UNTIMELINESS**

11 Defendants DDS and RCEB move to dismiss this action for failure to bring timely claims,  
12 arguing that plaintiff's claims are based on incidents that accrued between six and twenty-six years  
13 before this lawsuit was filed. “[The continuing violations doctrine extends the accrual of a claim  
14 if a continuing system of discrimination violates an individual’s rights up to a point in time that  
15 falls within the applicable limitations period.” *Douglas v. Cal. Dep’t of Youth Auth.*, 271 F.3d  
16 812, 822 (9th Cir. 2001) (citation omitted). The continuing violations doctrine applies if the  
17 plaintiff alleges “a systematic policy or practice of discrimination that operated, in part, within the  
18 limitations period—a systemic violation.” *Id.* (citation omitted). “A systemic violation claim  
19 requires no identifiable act of discrimination in the limitations period, and refers to general  
20 practices or policies[.]” *Id.* (citation omitted); *see also Flowers v. Carville*, 310 F.3d 1118, 1126  
21 (9th Cir. 2002) (“The doctrine applies where there is no single incident that can fairly or  
22 realistically be identified as the cause of significant harm.”).

23 DDS acknowledges that the continuing violation doctrine allows claims which are  
24 otherwise barred by the applicable statute of limitations to proceed where general practices or  
25 policies are the reason a plaintiff has suffered discrimination, but submits that plaintiff fails to  
26 plead facts demonstrating that DDS had a general discriminatory policy or practice against  
27 individuals with sight or hearing impairments. However, the FAC alleges that DDS administers  
28 services pursuant to the Lanterman Act without ensuring effective communication for hearing-

1 impaired consumers like plaintiff and continues to do so. FAC ¶¶ 94–99, 124–127. Therefore, so  
2 long as plaintiff is denied meaningful access to services provided pursuant to the Lanterman Act,  
3 the violation of disability discrimination laws continue. *See Pickern v. Holiday Quality Foods*  
4 *Inc.*, 293 F.3d 1133, 1136–37 (9th Cir. 2002) (“So long as the discriminatory conditions continue,  
5 and so long as a plaintiff is aware of them and remains deterred, the injury of the ADA  
6 continues.”); *see, e.g., Mosier v. Kentucky*, 675 F. Supp. 2d 693, 698 (E.D. Ky. 2009)  
7 (“Governments continue to discriminate against persons with disabilities by providing court  
8 proceedings without interpreters or auxiliary aids. Therefore, so long as Plaintiff is denied  
9 meaningful access to Defendants’ programs, the violation of the ADA continues. Plaintiff asserts  
10 that barriers still exist; thus, Plaintiff asserts a claim that falls within the statute of limitations.”).  
11 To find otherwise would destroy the requirement that governments provide persons with  
12 disabilities “meaningful access” to programs. *See Alexander v. Choate*, 469 U.S. 287, 301 (1985).  
13 Accordingly, the remaining claims, as they are based on systemic failures to remedy accessibility  
14 barriers that still exist, are not time-barred. The motion to dismiss the FAC on the basis of  
15 untimeliness is therefore **DENIED**.

16 **C. 12(B)(6) CHALLENGE BASED ON INSUFFICIENCY OF PLEADINGS**

17 **1. VIOLATION OF TITLE II OF ADA AGAINST DDS**

18 DDS moves to dismiss the first cause of action on two grounds: (1) failure to allege  
19 sufficient facts demonstrating that plaintiff was denied services by reason of her disability; and (2)  
20 failure to allege sufficient facts demonstrating intentional discrimination for purposes of monetary  
21 relief. The Court finds that neither argument has merit.

22 Title II of the ADA “forbids any ‘public entity’ from discriminating based on disability.”  
23 *Fry v. Napoleon Cnty. Sch.*, 137 S. Ct. 743, 749 (2017). Title II provides: “[N]o qualified  
24 individual with a disability shall, by reason of such disability, be excluded from participation in or  
25 be denied the benefits of the services, programs, or activities of a public entity, or be subjected to  
26 discrimination by any such entity.” 42 U.S.C. § 12132. To prove that a public program or service  
27 violated Title II of the ADA, a plaintiff must show that plaintiff is (1) “a ‘qualified individual  
28 with a disability’;” who (2) “was either excluded from participation in or denied the benefits of a

1 public entity's services, programs, or activities, or was otherwise discriminated against by the  
2 public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of [the]  
3 disability." *Updike v. Multnomah Cty.*, 870 F.3d 939, 949 (9th Cir. 2017) (quoting *Duvall v. City*  
4 *of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001), as amended on denial of reh'g en banc (Oct. 11,  
5 2001)). Where, as here, a disability action seeks monetary relief, a plaintiff must also prove a  
6 fourth element, intentional discrimination, met by allegations that satisfy the "deliberate  
7 indifference" standard. See *Duvall*, 260 F.3d at 1138–39.

8 First, like the original complaint, the FAC adequately alleges that plaintiff was denied  
9 equal access to DDS's services by reason of her disability. In *Lee v. City of Los Angeles*, 250 F.3d  
10 668 (9th Cir. 2001), the Ninth Circuit explained that the ADA "not only prohibits public entities  
11 from discriminating against the disabled, but it also prohibits public entities from *excluding* the  
12 disabled from participating in *or* benefitting from a public program, activity or service 'solely by  
13 reason of disability.'" *Id.* at 691 (quoting *Weinreich v. Los Angeles County Metro. Transp. Auth.*,  
14 114 F.3d 976, 978–79 (9th Cir. 1997)). The Ninth Circuit concluded that "[q]uite simply, the  
15 ADA's broad language brings within its scope anything a public entity does." *Id.* Here, the FAC  
16 alleges that "DDS's lack of any policies, procedures, or practices regarding accessibility for deaf  
17 consumers results in the widespread denial of effective communication. It also denies deaf  
18 consumers the opportunity to benefit from DDS's I/DD services and programs that is afforded to  
19 hearing consumers." (FAC ¶ 95.) These allegations adequately plead that plaintiff is "denied  
20 'meaningful access' to state-provided services" by reason of her disability. See *Crowder v.*  
21 *Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). Accordingly, DDS's first argument fails.

22 Second, unlike the original complaint, the FAC now adequately alleges deliberate  
23 indifference for purposes of pleading intentional discrimination. A plaintiff sufficiently alleges  
24 deliberate indifference by pleading two elements: (i) notice of the need for accommodation, and  
25 (ii) a failure to act. See *Duvall*, 260 F.3d at 1139. A plaintiff can allege notice by pleading that:  
26 (a) the plaintiff "alerted the public entity to [the plaintiff's] need for accommodation," (b) "the  
27 need for accommodation [was] obvious," or (c) the need for accommodation was "required by  
28 statute or regulation." *Id.* at 1139. The failure to act, meanwhile, "must be a result of conduct that

1 is more than negligent” and “involve[ ] an element of deliberateness.” *Id.* Failure that is merely  
2 “attributable to bureaucratic slippage” does not amount to deliberate indifference. *Id.*

3 Previously, the Court found that plaintiff’s “allegations with respect to both notice and  
4 failure to act are lacking.” (Dkt. No. 47 at 13.) However, the FAC cures these deficiencies with  
5 the following allegations:

6 59. On November 6, 2017, DDS hosted a public meeting in Oakland, California,  
7 on disparities in services for non-primary English speakers at RCEB and other  
8 regional centers in California. During this meeting, individuals and advocates  
9 spoke about the disparities in services for people who are deaf and the failure of  
RCEB and other regional centers to accommodate their needs so that they  
received services equal to those provided to hearing consumers.

10 67. On June 12, 2018, Disability Rights California, then representing Ms. Melton  
11 and other deaf and deaf-blind regional center consumers, sent a letter to the  
director of RCEB and the director DDS regarding the widespread problem with  
12 regional centers failing to accommodate deaf consumers. The letter specifically  
addressed Ms. Melton’s circumstances.

13 71. The letter requested a meeting with DDS and RCEB to discuss specific steps  
they could take to resolve the individual issues of Ms. Melton and also the policy  
14 issues affecting deaf consumers served by regional centers throughout the state.

15 72. On July 13, 2018, a meeting was held between attorneys for Disability Rights  
California and the director of RCEB as well as its Director of Consumer Services.  
Ms. Melton’s IPP and RCEB’s refusal to comply with its terms was discussed  
16 with no clear resolution as to when Ms. Melton would be provided the effective  
communication RCEB had agreed to.

17 73. On July 24, 2018, a meeting was held between attorneys from Disability  
Rights California and three high level administrators at DDS, including John  
Doyle and Brian Winfield, both Chief Deputy Directors and Hiren Patel, Chief  
Counsel.

18 74. On September 4, 2018, Disability Right California sent a letter memorializing  
its understanding of the July 24th meeting with DDS. The letter stated, “You  
agreed to release a program advisory about the affirmative obligations of regional  
19 centers to meet the communication needs of Deaf consumers in their living  
situations, day programs, and work programs.”

20 75. As of the date of this Complaint, DDS has never released an advisory to the  
regional centers relating to their obligations around the needs of deaf consumers.  
Nor has it taken action to intervene with RCEB on behalf of Ms. Melton to ensure  
she has effective communication in her DDS-funde[d] regional center services.

1           61. On November 29, 2018, DDS held a focus group for “Regional Center  
2 consumers who are Deaf or Hard of Hearing, their families and the community”  
3 to “receive your feedback on [ ] barriers and challenges to accessing services.”  
4

5           62. A number of deaf support agencies and vendors who serve deaf consumers  
6 attended the focus group to testify about the pervasive issue of deaf consumers  
7 not receiving adequate access to services from regional centers throughout the  
8 State.

9           63. Ms. Melton testified during this meeting about her experiences living in a  
10 home with no access to effective communication. She testified that she feels very  
11 lonely and that no one in her home understands her needs.

12           FAC ¶¶ 59, 61–63, 67, 71–72.

13           The foregoing allegations amply plead DDS’s notice of the need for accommodation for  
14 deaf consumers and its failure to act thereon. DDS’s argument that plaintiff fails to adequately  
15 allege intentional discrimination does not persuade. Accordingly, DDS’s motion to dismiss the  
16 cause of action for violation of Title II of the ADA is **DENIED**.

## 17           **2. VIOLATION OF TITLE III OF ADA AGAINST RCEB**

18           RCEB moves to dismiss the second cause of action on two grounds: (1) RCEB is not a  
19 “place of accommodation” under the ADA; and (2) failure to allege sufficient facts demonstrating  
20 that plaintiff was discriminated against because of her disability. The Court finds that both  
21 arguments are unavailing.

22           Title III provides: “[n]o individual shall be discriminated against on the basis of disability  
23 in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or  
24 accommodations of any place of public accommodation by any person who owns, leases (or leases  
25 to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a). To prevail on a Title III  
26 discrimination claim, the plaintiff must show that the plaintiff is (1) “disabled within the meaning  
27 of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public  
28 accommodation; and (3) the plaintiff was denied public accommodations by the defendant because  
of [the] disability.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007) (citation  
omitted).

For reasons similar to those stated above as to DDS, the FAC sufficiently alleges that

1 plaintiff was denied meaningful access to services secured by RCEB by reason of her disability  
2 and therefore RCEB's second argument fails. *See* FAC ¶¶ 108 ("Because Ms. Melton is deaf-  
3 blind, RCEB . . . [is] required and responsible to (sic) provide necessary accommodations in order  
4 to provide her equal access to [its] programs, ensure effective communication and prevent  
5 exclusion, segregation and the denial of services."), 109(a) (RCEB violates the ADA by "[f]ailing  
6 to ensure that the I/DD service providers [it] hire[s] communicate effectively with Ms. Melton),  
7 109(c) (RCEB further violates the ADA by "[a]ffording Ms. Melton an opportunity to participate  
8 in or benefit from [RCEB's] programs, facilities, accommodations and activities that is not equal  
9 to that afforded others").

10 With respect to RCEB's first argument that it does not qualify as a place of  
11 accommodation, the Court rejects RCEB's attempt to escape its obligations under Title III.  
12 Although RCEB is a private, nonprofit corporation, the FAC alleges that RCEB contracts with  
13 DDS, a state agency, to coordinate the delivery of services, including adult residential facilities,  
14 for developmentally disabled persons. (FAC ¶¶ 11, 18, 25.) The United States Department of  
15 Justice published guidance addressing a virtually identical situation:

16 A private, nonprofit corporation operates a number of group homes under contract  
17 with a State agency for the benefit of individuals with mental disabilities. These  
18 particular homes provide a significant enough level of social services to be  
19 considered places of public accommodation under title III. The State agency must  
ensure that its contracts are carried out in accordance with title II, and *the private  
entity must ensure that the homes comply with title III.*

20 U.S. Dep't of Justice, Title II Technical Assistance Manual: Covering State and Local  
21 Government Programs and Services, The Americans with Disabilities Act,  
22 <https://www.ada.gov/taman2.html#II-1.1000> (last visited November 5, 2021) (emphasis  
23 supplied).<sup>8</sup> Based on the foregoing illustration, and the contractual relationship that allegedly  
24

25 \_\_\_\_\_  
26 <sup>8</sup> DOJ regulations implementing Title III require that a public accommodation "furnish  
27 appropriate auxiliary aids and services where necessary to ensure *effective communication* with  
28 individuals with disabilities." 28 C.F.R. § 36.303(c)(1) (emphasis supplied). The United States  
Supreme Court has looked to DOJ's Manuals for guidance in the Title III context. *See Bragdon v.  
Abbott*, 524 U.S. 624, 646 (1998) (holding that DOJ's administrative guidance on ADA  
compliance is entitled to deference).

1 exists between RCEB and its group home vendors (FAC ¶ 25), the Court concludes that  
2 whether RCEB itself is a public accommodation is beside the point. Because RCEB facilitates  
3 access to the services of its group home vendors, which presumably are public accommodations,  
4 RCEB must ensure their compliance with Title III. Accordingly, Title III applies, and RCEB's  
5 motion to dismiss this cause of action is **DENIED**.

6                   **3. VIOLATION OF SECTION 504 OF THE REHABILITATION ACT**  
7                   **AGAINST DDS AND RCEB**

8 DDS moves to dismiss the third cause of action on the same grounds it moved to dismiss  
9 the Title II claim, namely, failure to allege causation and intentional discrimination. RCEB moves  
10 to dismiss this cause of action also on two grounds, namely, failure to allege causation as well as  
11 RCEB's receipt of federal funding. None of these arguments have merit.

12                  Section 504 of the Rehabilitation Act provides that “[n]o otherwise qualified individual  
13 with a disability, be excluded from the participation in, be denied the benefits of, or be subjected  
14 to discrimination under any program or activity receiving federal financial assistance.” 29 U.S.C.  
15 § 794(a). To state a claim under Section 504, a plaintiff must allege that the plaintiff (1) is an  
16 individual with a disability and (2) is otherwise qualified to participate in a program or activity;  
17 (3) the program or activity receives federal financial assistance; and (4) the plaintiff suffered  
18 discrimination on the basis of the disability. *See Bonner v. Lewis*, 857 F.2d 559, 562–63 (9th Cir.  
19 1988).

20                  For the reasons stated above as to the Title II claim, the FAC sufficiently alleges that  
21 plaintiff was denied meaningful access to DDS's services on the basis of her disability and that,  
22 for purposes of seeking monetary relief, DDS had notice of the need for accommodation but failed  
23 to take action. Accordingly, DDS's motion to dismiss the Section 504 cause of action against it is  
24 **DENIED**. *See Olmstead v. Zimring*, 527 U.S. 581, 589-90 (1999) (essentially same showing  
25 required to state a claim under Section 504 of Rehabilitation Act as to state a claim under Title II  
26 of ADA). By the same logic, RCEB's argument regarding failure to allege causation also fails.

27                  With respect to RCEB's argument that the FAC does not sufficiently allege its receipt of  
28 federal funding, the Court disagrees. The FAC alleges:

116. At all times relevant to the Complaint Defendant DDS is a recipient of federal financial assistance within the meaning of Section 504. DDS's I/DD services program is a "program or activity receiving Federal financial assistance" because DDS receives federal funding directly and indirectly through federal medical and social services program to ensure the provision of I/DD services.

117. At all times relevant to the Complaint Defendant RCEB has been a recipient of federal assistance within the meaning of Section 504. RCEB is a “program or activity receiving Federal financial assistance” as referred to in 29 U.S.C. § 764(a), because it is an operation of DDS, which received Federal financial assistance for its services. Nearly 100% of the federal funding DDS receives is funneled into the regional centers, including RCEB. RCEB was created for the express purpose of receiving and distributing those funds.

FAC ¶ 116–17.

At this stage, the Court finds these allegations as to RCEB’s receipt of federal financial assistance sufficient to withstand the motion to dismiss. “[T]he vast majority of courts faced with the issue of whether an entity receives federal financial assistance within the meaning of the civil rights laws have concluded that the resolution of the issue requires inquiry into factual matters outside the complaint and, accordingly, is a matter better suited for resolution after both sides have conducted discovery on the issue.” *PAS Commc’ns, Inc. v. U.S. Sprint, Inc.*, 112 F. Supp. 2d 1106, 1111 (D. Kan. 2000) (collecting cases). Thus, RCEB’s argument that the FAC lacks “further explanation regarding those funds” is not well taken. Accordingly, RCEB’s motion to dismiss the Section 504 cause of action against it is also **DENIED**. To the extent that these allegations are, in fact, not true, that would be the subject of summary judgment, not a motion to dismiss.

#### **4. VIOLATION OF CALIFORNIA GOVERNMENT CODE SECTION 11135 AGAINST RCEB**

RCEB moves to dismiss the fifth cause of action for failure to allege sufficient facts demonstrating that plaintiff was discriminated against because of her disability. California Government Code Section 11135 prohibits denying persons with a disability “full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.” Cal. Gov. Code

1       §11135(a). Section 11135 “is identical to the Rehabilitation Act except that the entity must  
 2 receive State financial assistance rather than Federal financial assistance.” *Y.G. v. Riverside*  
 3 *Unified Sch. Dist.*, 774 F. Supp. 2d 1055, 1065 (C.D. Cal. 2011); *D.K. ex rel. G.M. v. Solano*  
 4 *County Office of Educ.*, 667 F. Supp. 2d 1184, 1191 (E.D. Cal. 2009). Section 11135 is also  
 5 coextensive with the ADA because it incorporates the protections and prohibitions of  
 6 the ADA and its implementing regulations. *See* Cal. Gov. Code § 11135(b) (so stating). For the  
 7 reasons stated above, the FAC sufficiently alleges that plaintiff was excluded from services  
 8 coordinated by RCEB by reason of her disability. The motion to dismiss the cause of action for  
 9 violation of California Government Code Section 11135 is **DENIED**.

## 10           **5. VIOLATION OF THE UNRUH CIVIL RIGHTS ACT AGAINST RCEB**

11       RCEB moves to dismiss the sixth cause of action on the ground that it is not a “business  
 12 establishment,” and thus, the Unruh Act does not apply to it. The Unruh Act prohibits “all  
 13 business establishments of every kind whatsoever” from discriminating on the basis of  
 14 disability. Cal. Civ. Code § 51(a). The Unruh Act prohibits discrimination “by a ‘business  
 15 establishment’ in the course of furnishing goods, services or facilities to its clients, patrons or  
 16 customers.” *Alcorn v. Anbro Eng’g, Inc.*, 2 Cal.3d 493, 500 (1970). The California Supreme  
 17 Court held that the term “business establishments” in the Unruh Act “was used in the broadest  
 18 sense reasonably possible.” *Burks v. Poppy Constr. Co.*, 57 Cal.2d 463, 468 (1962).

19       The *O’Connor* court explained that there is “no reason to insist that profit-seeking be a sine qua  
 20 non for coverage under the act. Nothing in the language or history of its enactment calls for  
 21 excluding an organization from its scope simply because it is nonprofit.” *Id.* at 430–31; *see also Doe v. California Lutheran High Sch. Ass’n*, 170 Cal. App. 4th 828, 836 (2009) (“An  
 22 organization is not excluded from the scope [of the act] simply because it is a nonprofit.”).  
 23 Accordingly, any analysis must look beyond whether the corporation in question is for-profit or  
 24 non-profit to whether the organization has a “businesslike purpose.” *O’Connor*, 662 P.2d at 431.

25       To determine whether or not an organization qualifies as a “business establishment” under  
 26 the Unruh Act, courts consider the following nonexclusive factors:

27           1. what, if any, business benefits one may derive from membership; 2. the number

1 and nature of paid staff; 3. whether the organization has physical facilities, and if  
2 so, whether those facilities are incidental to the purposes and programs of the  
3 organization; 4. what are the purposes and activities of the organization; 5. the  
4 extent to which the organization is open to the public; 6. whether there are any  
fees or dues for participation or membership, and if so, what percentage of those  
involved in the organization pay them; and 7. the nature of the organization's  
structure.

5 *Harris v. Mothers Against Drunk Driving*, 40 Cal. App. 4th 16, 20 (1995). RCEB contends that  
6 the FAC lacks any indication that RCEB engaged in anything "synonymous with calling,  
7 occupation or trade, engaged in for the purpose of making a livelihood or gain." (RCEB Mtn. at  
8 23 (quoting *Taorminia v. Cal. Dep't of Corrections*, 946 F. Supp. 829, 834 (S.D. Cal. 1996)).)

9 The thrust of this argument was accepted in *Roe v. California Dep't of Developmental*  
10 *Servs.*, No.16-CV-3745 (WHO), 2017 WL 2311303 (N.D. Cal. May 26, 2017). There, the court  
11 concluded that the plaintiff did not plead sufficient facts to establish that RCEB, also a defendant  
12 in that case, was a business establishment. "She merely recites the elements of a claim under the  
13 Unruh Act. . . . On the current record, it is impossible to tell whether RCEB has any of the typical  
14 features of a 'business establishment'—whether, for example, it has a board of directors, whether  
15 it has a large number of employees, whether and whom it charges fees in exchange for services,  
16 and other crucial facts are all omitted." *Id.* at \*16 (citations omitted).

17 The same is not true here, where the FAC alleges:

18 157. Defendant RCEB is a non-profit business establishment, with business-like  
19 purposes. RCEB is a service coordination center for people with developmental  
20 disabilities, governed by a board of directors. RCEB employs approximately 450  
21 people who work together to coordinate contracted services for members. RCEB  
22 members are assisted with accessing a panoply of services, including out of home  
placement, in-home supports, testing, training and educational opportunities to  
equip members with the tools necessary to live their most productive and  
satisfactory lives despite their disabilities. These services are provided by  
vendors under contract with RCEB.

24 158. RCEB collects an annual family program fee for families with children  
25 under age 18 with adjusted gross incomes above a certain level. RCEB also  
26 implements a Family Cost Participation Program with requires families with  
children under age 18 to pay a certain amount of the cost of programmatic  
services for their children.

27 159. RCEB has physical offices at 500 Davis Street, San Leandro, California and  
28 1320 Willow Pass Road in Concord, California. Its caseworkers and managers

1 operate from those offices. It sets its policies there. It conducts meetings for,  
2 with, and regarding its clients, its vendors and DDS, its funder, at those offices.  
3 Meetings conducted there include meetings for individual clients, at which the  
level of services is set and reviewed. In addition, RCEB holds support meetings  
4 and advisory meetings, vendor meetings and board meetings at its two locations,  
all of which are open indiscriminatory to other members of the general public.

5 FAC ¶¶ 157–59.

6 The Court finds these allegations as to RCEB’s status as a business establishment sufficient  
7 to withstand the motion to dismiss. “In light of the multi-factored test under which courts  
8 determine if an entity qualifies as a business establishment and considering that courts have found  
9 that [non-profit corporations] qualify, whether [RCEB] qualifies depends on facts that are not fully  
10 developed and that are not yet before the Court.” *R.K., ex rel. T.K. v. Hayward Unified School*  
11 *Dist.*, No. 06-CV-7836 (JSW), 2007 WL 2778730, at \*7 (N.D. Cal. Sept. 21, 2007) (declining to  
12 “dismiss the Unruh Act claim on this basis at this procedural stage”). Accordingly, the motion to  
13 dismiss the cause of action for violation of the Unruh Act is **DENIED**.

#### 14       **6. VIOLATION OF THE CALIFORNIA DISABLED PERSONS ACT AGAINST RCEB**

15 RCEB moves to dismiss the seventh cause of action on the ground that plaintiff cannot  
16 maintain a CDPA claim based on the denial of services. The California Disabled Persons Act  
17 provides that individuals with disabilities “shall be entitled to full and equal access, as other  
18 members of the general public, to . . . places of public accommodation.” Cal. Civ. Code §  
19 54.1(a)(1). According to RCEB, “[t]he CDPA is concerned solely with *physical* access to public  
20 spaces.” (RCEB Mtn. at 25 (quoting *Gasca v. County of Monterey*, No. 16-CV-4221 (BLF), 2019  
21 WL 1455329, at \*2 (N.D. Cal. April 2, 2019))). However, the California Supreme Court has  
22 stated otherwise. *See Jankey v. Lee*, 55 Cal.4th 1038, 1044–45 (2012) (“[The California Disabled  
23 Persons Act] generally guarantees people with disabilities equal rights of access ‘to public places,  
24 buildings, facilities and *services*, as well as common carriers, housing and places of public  
25 accommodation.’”) (quoting *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 674 n.8 (2009)) (emphasis  
26 supplied).

27 More fundamentally, the CDPA provides that “[a] violation of the right of an individual  
28 under the Americans with Disabilities Act of 1990 also constitutes a violation of this section,

1 and this section does not limit the access of any person in violation of that act.” Cal. Civ. Code §  
2 54.1(d). Because plaintiff’s ADA claims remain viable, so too does her CDPA claim.  
3 Accordingly, the motion to dismiss the cause of action for violation of the CDPA is **DENIED**.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the motions to dismiss are **GRANTED IN PART AND DENIED IN**  
6 **PART**. The first, second, third, fifth, sixth, and seventh causes of action survive both the 12(b)(1)  
7 challenge, as they allege systemic discrimination addressed in the June 2018 DRC letter and  
8 therefore have been properly exhausted pursuant to Section 4731, as well as the 12(b)(6)  
9 challenges. Conversely, the fourth, eighth, and ninth causes of action are **DISMISSED WITH**  
10 **PREJUDICE** under Rule 12(b)(1). These causes of action are either based on specific IPP-service  
11 issues, in which case they have not been exhausted under the fair hearing procedure; or not IPP-  
12 related, but were not otherwise raised in the aforementioned letter and therefore have not been  
13 exhausted under the Section 4731 complaint process. The motion for sanctions is **DENIED** as  
14 plaintiff’s arguments are not found to be frivolous.

15 Defendants shall respond to the remaining causes of action within **twenty (21) days** of  
16 filing. The Court hereby **SETS** an initial case management conference for **December 13, 2021**, at  
17 **9:00 a.m.** via Zoom.

18 The Order terminates Docket Numbers 52, 53, 54, and 64.

19 **IT IS SO ORDERED.**

20 Dated: November 5, 2021

  
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YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE